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R013LIFE LEASE HOUSING IN CANADA: A PRELIMINARY
EXPLORATION OF SOME CONSUMER PROTECTION ISSUES**Introduction**

This study, completed under the CMHC External Research Program, examines life lease housing. It describes how life lease housing operates in Canada and explores issues related to the regulation of this relatively new housing option for seniors.

The study provides basic information, particularly from a regulatory perspective, for governments, sponsors, as well as current and prospective residents of life lease housing projects. Consumer protection issues currently of interest to governments and consumers are discussed and specific issues which could be addressed in a legislative framework are identified.

Methodology

The study is based on four components:

- a survey of sponsoring organizations—37 sponsors answered a lengthy survey;
- interviews with three major development consultants specializing in life lease housing;
- contact was made with representatives of the five provincial governments where life lease housing primarily exists - i.e. all provinces west of Québec; and
- the author's previous work on life lease housing (see Alternate Tenure Arrangements, CMHC, 2000).

Findings

It is estimated that there are about 200 life lease housing projects in Canada, two-thirds of which are in Ontario and Manitoba. Life Leases offer an alternative mechanism to create seniors housing. Residents of life lease projects purchase a "right to occupy" a dwelling unit for life.

Substantial resident equity (entrance fee) is required, ranging from 25 per cent of the value or cost of the unit to 100 per cent. Some portion of this equity is returned to the resident, or their estates, when residents end occupancy of their unit. Residents are required to make monthly payments to cover ongoing maintenance and operating costs.

Most life leases in Canada have been sponsored by community based non-profit organizations such as churches, services clubs, or ethnic groups. They are designed specifically for a seniors' market and include features and amenities that appeal to seniors. There are currently very few private life lease projects.

There are four basic forms of life lease arrangements in Canada:

Declining Balance Lease—the refund of entrance fees, when a lease is terminated, declines over time in fixed amounts. Under this model the fee is really a form of prepaid rent.



Fixed Value Lease—the original entrance fee is refunded at lease termination less a fee for administrative expenses in some cases.

Index-Based Lease—in this model residents are able to earn a return on their investment. An additional amount based on an index, e.g. Consumer Price Index, is returned along with the original entrance fee.

Market Value Lease—a resident's unit is sold on the open market. Depending on the state of the residential real estate market, a resident may gain or lose equity.

Legislation, Regulatory Framework and Common Operating Principles

Manitoba is the only province to have enacted legislation specific to life lease housing: the Life Leases Act, December 1999. Other provinces are studying the possibility of introducing similar legislation. Some regulatory mechanisms may apply in provinces other than Manitoba. Significant variation exists in how individual life lease projects are developed and managed. An overview by jurisdiction follows along with comments on common operating and development principles of such projects:

Ontario

Under the Land Transfer Tax Act, all life lease transactions are subject to tax; however this is currently under review and collection of this tax is not being enforced. The March 27, 2003 Ontario Budget proposed to exempt certain transfers of life lease units from the payment of land transfer tax. Under the Assessment Act life leases are assessed as residential rather than multi-residential for property tax purposes (multi-residential would in many cases result in a higher tax assessment rate).

There are many basic operational principles shared by most life lease projects in Ontario. Purchasers normally make two deposits: first to reserve a unit (typically \$2,000 to \$5,000), and secondly when the life lease agreement is signed (20-25 per cent of purchase price). Deposits are not held in trust and are routinely used to fund construction of the building. The balance of the purchase price for the life lease interest is due upon occupation. When a resident sells their right-to-occupy, sponsors typically retain an administrative fee of 5-10 per cent of the resale value. The market value of a life lease unit is similar to comparable condominiums.

Ontario is undertaking outreach with the life lease industry to encourage the adoption of best practices in regard to consumer protection, and is continuing to monitor consumer protection issues and communicate with interested parties including life lease and senior citizen stakeholders.

Manitoba

The Life Leases Act, which is administered by the Residential Tenancies Branch, became law in Manitoba on December 1, 1999 after a long and comprehensive consultation process with all stakeholders. Life lease housing is considered a form of rental housing and it is subject to the Residential Tenancies Act. The Life Leases Act applies to both non-profit and for-profit landlords of life lease projects.

The Act was created to do three main things:

- To require that tenants be given critical information about life leases, the life lease complex and their units before they pay a pre-lease payment or an entrance fee. Tenants must also be given the financial status of their complex at least once a year.
- To protect tenants' funds. Pre-lease payments are limited to \$1,000.00 and must be held in trust (in most cases) until the life lease agreement is signed, at which time it is generally applied to the entrance fee. Entrance fees, which may be any amount up to 100 per cent of the unit capital cost, are held by a trustee. They may be used to pay for development of the complex providing several conditions, similar to those required by lenders, are met. Life lease complexes must have capital repair and replacement reserves. Funds held in reserves must be held in government-backed financial products. Rent increases are subject to review and alteration by the Residential Tenancies Branch if requested by a tenant. Landlords must register a mortgage to cover entrance fees.
- To amend the Residential Tenancies Act to make it apply more effectively to landlords and tenants of life lease complexes.

Saskatchewan

There are very few statutory requirements that life lease developers and operators must observe in Saskatchewan. It is not clear how the provisions of the Residential Tenancies Act apply to life lease projects. The Saskatchewan Real Estate Commission, which enforces the Real Estate Act, does not regulate life lease housing projects.

The Saskatchewan Housing Corporation, in partnership with municipalities and seniors, has participated in the development of several life lease housing projects in the province.

Alberta

Only the provisions of common law apply to the development and operation of life lease housing in Alberta. The provincial government has recently launched a process to determine if life lease legislation is required in the province.

A fixed value life lease project is being developed that will be owned and operated by a for-profit developer. Residents can invest in the development of the project although these life lease residents will not realize any capital appreciation on their units when terminating their right-to-occupy. Their investment may be considered a form of pre-paid rent. Those who prefer not to invest their money in the development but who want to live in the project can rent.

Alberta is also home to the only licensed life lease projects (Laurier House—phases I and II) in Canada. Residents pay the full cost of housing services and the Capital Health Authority pays the full cost of all required health services. One of the advantages of this model is that it allows spouses and others who may not require care to live in a licensed facility.

British Columbia (BC)

In BC, life lease housing is generally regarded as a form of ownership and guaranteed buy-backs¹ are common. The development and sale of life lease projects in B.C. are subject to the provisions of the Real Estate Act. Deposits of any amount may be taken; however, they must be held in trust pending completion of the building and subsequent completion of the purchase. The Real Estate Act also specifies that any subdivision of land involving an offer for sale or long term lease requires the filing of a disclosure statement with the Superintendent of Real Estate.

The Superintendent of Real Estate requires either the registration of the lease on title, or some alternate mechanism such as registration of a mortgage on each unit in favour of the resident.

Most recent life lease projects are strata (or condominium) titled. These projects are subject to all the provisions of the Strata Property Act. Under the provisions of the Strata Property Act, life leases are required to establish and maintain a Replacement Reserve Fund, the size of which is subject to rules.

In the spring of 2003 the BC government launched a public consultation process focused on life lease housing and long term leases. The consultation process is intended to help the government develop possible strategies to better respond to potential life lease issues.

Consumer Protection Issues

Consumer protection issues which may be of interest to governments considering legislation:

Disclosure

Life leases are a relatively new form of tenure and many consumers are unfamiliar with them. Except in Manitoba and B.C., there are no mandatory disclosure requirements that sponsors must observe. Elsewhere, the degree to which disclosure is made is an individual decision that varies from sponsor to sponsor.

From the standpoint of enhancing consumer protection, a requirement to provide full disclosure of all material facts, including, for example, the risk of loss of entrance fees and all ongoing financial information, is one of the most effective mechanisms available to governments.

Safety of Deposits Prior to Occupancy

Prior to occupancy, there are concerns about what would happen to deposit funds if a sponsor is forced to halt construction before the project is finished, or if sufficient pre-sales cannot be made to allow construction to begin. Many non-profit sponsors believe that the ability to use deposits for construction purposes is absolutely critical to the continuation of the life lease model. The fact that sponsors in B.C. are not able to use resident equity may account for the relative scarcity of life lease projects in that province.

Other provinces may wish to refer to the Manitoba legislation, which permits the use of entrance fees during

¹ The use of the word “guaranteed” may be rather misleading since in point of fact, there may be occasions when sponsors are unable to honour such guarantees. Some industry participants avoid the use of the term “guaranteed buy-back” for this reason and believe consumers would be better off if the term were replaced by a more precise phrase. Although the term is used throughout the report, readers should be aware of its limitations. In Manitoba, buy-backs are referred to as refunds.

construction under controlled circumstances (e.g., fixed price contracts, availability of sufficient funds to complete the project, etc.).

Security of Occupancy

Consumers may invest very significant amounts of money in life lease projects, the security for which varies greatly from province to province and from sponsor to sponsor. Many sponsors routinely ensure that their residents' interests are registered in some way on title, in order to protect both resident and sponsor. In B.C., the Superintendent of Real Estate insists that some mechanism be used to register residents' interests on title, either by way of lease registration or by way of mortgage registration. Other provinces could take similar steps.

Refunding of Entrance Fees

Where they are available (most commonly in Western Canada), so-called "guaranteed" buy-back provisions are an important and very appealing feature of life lease projects from the perspective of purchasers. However, such provisions are not really guaranteed and some sponsors have stopped using the term. Where guaranteed buy-backs are provided for, there is usually some period of time specified before sponsors are required to refund entry fees—usually from 90 to 180 days. Many agreements also incorporate a provision for a longer refund period in the event of slow markets—up to two years in many cases.

From a regulatory standpoint, there is really no practical way of ensuring that life lease residents are never at risk of losing part or all of their entrance fees, as there is no practical way of ensuring that losses do not occur in any real estate transaction. Full disclosure about how and under what circumstances entrance fees will be refunded would ensure that consumers are aware of the risks they are assuming.

Replacement Reserves

Condominium legislation ensures that strata councils make provision for replacement reserves but there is no legislative requirement (except in Manitoba) for life lease operators to do the same. Some sponsors make provision for replacement reserves as a standard operating procedure, even where there is no law compelling them to do so.

Governments that are thinking of introducing life lease legislation might want to consider the usefulness of including a requirement for mandatory replacement reserves, similar to that for condominiums, as well as annual reporting of the size of the replacement reserve (and disclosure of reserve amount) as required in the Manitoba legislation.

Disclosure of Warranty Protection

Mandatory warranty protection applies to life lease projects in B.C.. In Ontario, warranty protection does not extend to life lease projects as they are not deemed to be a form of ownership housing. The maintenance, repair, and warranty provisions in a project, or lack thereof, should be included in disclosure statements.

Provision of Services

Many life lease projects offer support services to their residents. This can create issues from a consumer protection perspective, particularly where residents have invested large amounts of capital in their unit. For example, if tenants in rental projects decide they do not like the quantity or quality of available services, they can simply move out. Moving out may or may not be so easy for life lease residents.

Regulators may not want to become involved in disputes over the quality of services, but they may want to consider some way of dealing with the availability and cost of services that are promised by sponsors to life lease purchasers.

Governance

The involvement of residents in the operation of the life lease building they live in varies greatly from sponsor to sponsor. Many residents do not want to be involved in managing their building and this is often one of the reasons people choose life lease over condominiums.

It may be best to limit legislation in this area to full disclosure of all operating information to ensure that residents know how their project is being managed. The degree of involvement of residents in managing the building would be left to the discretion of the sponsor.

Dispute Resolution

Governments that are contemplating legislation might well include a provision for alternate dispute resolution such as arbitration or mediation instead of resorting to the courts for the resolution of life lease issues that may be contentious.

Conclusions

Consultants and many other people with an interest in seniors housing and in life lease believe that some type of legislative framework (where it does not exist already) would be beneficial for life lease consumers, as long as it is not overly prescriptive. A large majority (84 per cent) of sponsors believe that some measure of consumer protection for life lease housing would be helpful (a survey of life lease residents was not part of this study). A regulatory framework may help promote a better understanding of life lease tenure. Such legislation or regulation could address such issues as:

- disclosure;
- safety of deposits prior to occupancy;
- security of occupancy;
- refunding of entrance fees;
- replacement reserves;
- disclosure of warranty protection;
- provision of services;
- governance; and
- dispute resolution.

The challenge for governments will be to draft legislation and regulations that will be acceptable to the various stakeholders in life lease housing. Stakeholders consulted by Manitoba in 2002 reported that the legislation in that province is working well.

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Research Report: *Life Lease Housing in Canada: A Preliminary Exploration of Some Consumer Protection Issues*

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